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In the Supreme Court of the United States

OCTOBER TERM, 1996

D. DEAN BIBLES, OREGON STATE DIRECTOR, BUREAU OF LAND MANAGEMENT, PETITIONER

v.

OREGON NATURAL DESERT ASSOCIATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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1. Respondent errs in contending (Br. in Opp. 2) that we challenge only the application of the governing legal standard to the circumstances of this particular case. The court of appeals accepted respondent's invitation to "bridle at and practically ignore the FOIA teachings of [this Court]." Pet. App. 8a (Fernandez, J., dissenting).

In ordering release of the mailing list used to distribute the *BLM News*, the court of appeals failed to abide by the controlling precedents of this Court to determine whether documents requested under the Freedom of Information Act (FOIA), 5 U.S.C. 552(a), are exempt from disclosure under Exemption 6 of the FOIA, 5 U.S.C. 552(b)(6). See *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), and *United States Dep't of*

Defense v. *FLRA*, 510 U.S. 487 (1994). In particular, the court ignored this Court's repeated admonition that the only relevant public interest under FOIA Exemption 6 is the extent to which disclosure would contribute significantly to the public's understanding of the government's operations or activities. *Reporters Committee*, 489 U.S. at 775; *Defense* v. *FLRA*, 510 U.S. at 495.

The court of appeals applied a different test—one that permitted consideration of a different public interest. Under the court of appeals' test, the public interest to be weighed for purposes of Exemption 6 includes the extent to which disclosure would permit third parties to send information to recipients of government information. Thus, the court relied upon what it characterized as

> a substantial public interest in knowing to whom the government is directing information, or as [respondent] characterizes it, "propaganda," *so that those persons may receive information from other sources* that do not share [petitioner's] self-interest in presenting government activities in the most favorable light.

Pet. App. 6a (emphasis added).

Respondent attempts to avoid the clear import of that ruling by reading the initial clause (the interest in knowing to whom the government directs information) to be the only element defining the court of appeals' view of the public interest in disclosure. Respondent treats (Br. in Opp. 5) the "so that" clause as if it were only a description of "other consequences [that] might follow from such a revelation." Respondent's strained interpretation is refuted by the court's restatement, in the closing paragraph of its

opinion, of the "significant public interest" on which it relied: the interest in "knowing with whom the government has chosen to communicate *and in providing those persons with additional information*." Pet. App. 8a (emphasis added). Thus, in both of its definitions of the relevant public interest, the court considered the uses to which the requested documents were to be put. That approach is flatly inconsistent with this Court's ruling that whether Exemption 6 permits withholding of a requested document "cannot turn on the purposes for which the request for the information is made," or on the identity of the FOIA requester. See Pet. 14 (quoting *Defense* v. *FLRA*, 510 U.S. at 496, and *Reporters Committee*, 489 U.S. at 771).[1]

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[1] Even if respondent were correct that the court of appeals had only considered the interest in knowing to whom the government provides information as sufficient, standing alone, to constitute a "significant public interest" for purposes of Exemption 6, that holding would be contrary to the holding of the D.C. Circuit that disclosure of names and addresses of recipients of government information "say[s] nothing of significance about 'what the[] Government is up to.'" *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d 873, 879 (1989) (quoting *Reporters Committee*, 489 U.S. at 780), cert. denied, 494 U.S. 1078 (1990). The D.C. Circuit emphasized that, "unless the public would learn something directly about the workings of the *Government* by knowing the names and addresses of [the listed persons], their disclosure is not affected with the public interest." *Ibid.* The dissenting opinion below in the instant case made the same point:

> The information that a mailing list will give the public about what the government is up to is minuscule or nil, most likely the latter. * * * [I]t tells us nothing about government when we discover that the mailer went to John Doe in New York or Billy Rowe in Los Angeles.

2. Respondent's attempt (Br. in Opp. 6-8) to discount the invasion of privacy that would result from disclosure of the requested mailing list relies on the same flawed reasoning as the court of appeals (see Pet. 20-27) and echoes the "cramped notion of personal privacy" rejected by the Court in *Reporters Committee*, 489 U.S. at 763 (see Pet. 24).

The fact that some persons asked to be put on the mailing list does not, as respondent suggests (Br. in Opp. 6-7), lessen their privacy interest in keeping out other mail. The Court has expressly recognized that an individual's disclosure of his or her name and address to the government for one purpose "does not mean that an individual has no interest in limiting disclosure or dissemination of the information." *Reporters Committee*, 489 U.S. at 770 (citation omitted); see also *Defense* v. *FLRA*, 510 U.S. at 500 ("An individual's interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form."). And the Court has recognized the privacy interest that "individuals have in preventing at least some unsolicited, unwanted mail from reaching them at their homes." *Id.* at 501 (privacy of home given special consideration "in our Constitution, laws, and traditions").

Respondent suggests (Br. in Opp. 7-8 & n.3) that the record does not provide sufficient evidence of likely privacy intrusions that would result from further dissemination of the mailing list. Respondent disregards the fact that, under *Defense* v. *FLRA*, the

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> [Respondent] does not really want to check on the government; it wants to contact the people on the list.

Pet. App. 9a (Fernandez, J., dissenting).

assessment of the privacy implications of disclosure of home addresses must include consideration of the effects of disclosure not just to the requester at hand, but to the general public, including "other parties, such as commercial advertisers and solicitors." 510 U.S. at 501; *National Ass'n of Retired Federal Employees* v. *Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990). The Court has confirmed the unavoidable fact that such general disclosure of home addresses will inevitably lead to unwanted solicitations by commercial advertisers and other interests. See *Defense* v. *FLRA*, 510 U.S. at 501 (because address list would be disclosed to "commercial advertisers and solicitors" under FOIA, the Court found it "clear that the individual privacy interest that would be protected by nondisclosure" was "far from insignificant").[2]

Finally, respondent contends (Br. in Opp. 8) that "accepting Petitioner's privacy argument would create a new, *de facto* exemption from FOIA for all government held mailing lists." But it is the Ninth Circuit that has adopted an overly broad rule regarding the privacy interests at stake—a rule that

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[2] The record in this case demonstrates that intrusion on the privacy interests of those included on the mailing list is certain. Respondent alleged that the purpose of its FOIA request was "to provide balance by use of the mailing list for those people who receive the BLM's publication," and that it "intends to make the mailing list available to other public interest groups who share similar goals." See C.A. E.R. 10. Respondent stated that it and similar groups would make use of the mailing lists in order to "educate the recipients of the 'BLM News' that the Oregon high desert is threatened and the BLM is mismanaging this natural resource" and to "enlist[] the readers of the 'BLM News' in the effort to save these lands' primitive and pristine character." *Id.* at 18.

threatens the disclosure of the home addresses of thousands of individuals merely because they receive information from the federal government. Under the Ninth Circuit's open-ended "public interest" standard, a requester may be able to obtain a mailing list simply to contradict information provided by the government. Pet. App. 6a.[3] The FOIA was not intended to require that an individual surrender his or her privacy interest in limiting unwanted mailings at home in order to obtain information from his or her government.

For the foregoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER S. DELLINGER
Acting Solicitor General

DECEMBER 1996

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[3] As we noted in our petition (Pet. 26-27), the Ninth Circuit's decision is especially troubling in light of today's sophisticated computer marketing campaigns and the numerous lists used by other agencies of the government to provide information to its citizens.